No. 75-758

In the

Supreme Court of the United States

OCTOBER TERM, 1975

DAVID LEFKOVITS and JOHN T. MEAGHER,

Plaintiffs-Appellants,

vs.

STATE BOARD OF ELECTIONS, MICHAEL E. LAVELLE, DON W. ADAMS, WILLIAM L. HARRIS and FRANKLIN J. LUNDBERG, members of the State, Board of Elections; DAN WALKER, Governor of the State of Illinois, MICHAEL J. HOWLETT, Secretary of State of Illinois; ALAN J. DIXON, Treasurer of State of Iilinois; GEORGE W. LINDBERG, Comptroller of State of Illinois; BERNARD J. KORZEN, Treasurer of Cook County; and STANLEY T. KUSPER, JR., County Clerk of Cook County,

Defendants-Appellees,

CHICAGO BAR ASSOCIATION: CHICAGO COUNCIL OF LAWYERS: and ILLINOIS STATE BAR ASSOCIATION,

Intervenors-Defendants-Appellees.

JURISDICTIONAL STATEMENT OF PLAINTIFFS-APPELLANTS

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OPINION BELOW

The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, sit-

ting as a three-judge court pursuant to 28 U.S.C., § 2281, is reproduced in Appendix "A" *infra*. This Opinion is unreported.

JURISDICTION

This is an action seeking declaratory and injunctive relief, brought originally by David Lefkovits, a Judge of the Circuit Court of Cook County, Illinois, and John T. Meagher, a qualified elector residing in Cook County, charging that the Illinois constitutional requirement of the affirmative vote of three-fifths of the electors to retain a judge in office was violative of the equal protection guarantee within the Fourteenth Amendment.

The judgment of the three-judge District Court was entered on September 3, 1975. Notice of Appeal was filed in the United States District Court for the Northern District of Illinois, Eastern Division, on September 25, 1975.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1253. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States, in pertinent part, states:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

2. Article IV, § 12(b), Illinois Constitution of 1970, provides in pertinent part as follows:

> Not less than six months before the general election preceding the expiration of his term of office,

> a Supreme, Appellate or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself. The Secretary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election.

QUESTIONS PRESENTED FOR REVIEW

Whether the constitutional requirement of a supermajority affirmative vote of three-fifths of the electorate voting on the question of a judge's retention denies a voter the equal protection of the laws guaranteed by the Fourteenth Amendment in that his affirmative vote for retention of judges is diluted and debased by the extraordinary majority requirement in light of this Court's holding in *Gordon* v. *Lance*, 403 U.S. 1 (1971)?

STATEMENT OF THE CASE

This is a suit originally brought by plaintiffs, David Lefkovits and John T. Meagher, in the Circuit Court of Cook County seeking, *inter alia*, a declaration that Article VI, section 12(d) of the Constitution of the State of Illinois of 1970 was itself unconstitutional as violative of the Fourteenth Amendment guarantee of equal

protection of the laws in that his affirmative vote for retention of judge is diluted and debased by the extraordinary majority requirement of three-fifths.

The defendants initially sued in this cause are various State officials and bodies who perform official functions in the electoral process. Following an emergency hearing in this cause, Judge Daniel Covelli of the Circuit Court of Cook County, Illinois, entered a preliminary injunction maintaining the *status quo* of Judge Lefkovits' status as a Judge of the Circuit Court of Cook County. Subsequently, the defendants caused the suit to be removed to the federal District Court in view of the federal question presented. In due course, the Chicago Bar Association with its officers, the Illinois State Bar Association with it officers and the Chicago Council of Lawyers and its officers were permitted to intervene as defendants. A three-judge court was instituted on December 23, 1974, and ultimately granted defendants' alternative motion to dismiss or for summary judgment.

The material facts underlying this cause of action are not in dispute, and for the most part, are a matter of public record. Historically, Illinois has fluctuated in its approach to the selection and retention of judges.

The Constitution of 1818 provided, in Article IV, for an appointive system "by joint ballot of both branches of the general assembly, and commissioned by the governor, and shall hold their offices during good behavior . . ."

In 1848, the Illinois voters adopted a new Constitution, which in Article V opted for a judiciary "elected by the qualified electors" of the divisions or districts. Sections

3 and 7. Vacancies were filled by executive appointment. Section 9. Removal was effected "for any reasonable cause . . . which shall not be sufficient ground for impeachment . . . on the vote of two-thirds of the members . . . of the general assembly . . . ."

In 1870, the Illinois voters adopted a new constitution, and in Article VI adhered to their desire to elect judges. The only significant change material here is the requirement of the concurrence of three-fourths of each Houses' members for removal "for cause."

In 1964, the Constitution of 1870 was amended with the adoption of an entirely new Judicial Article, Article VI. The Article made substantial changes in the organizational structure of the state court judicial system, but material here was the introduction of the "retention" election concept to judicial tenure following the initial contested election of the judge. Section 11 dictated that the name of the incumbent judge "shall be submitted to the voters on a special judicial ballot without party designation on the sole question whether he shall be retained in office. The . . . affirmative votes of a *majority* of the voters voting on the question . . . ." No specific provision was made for the filling of vacancies, other than at the next general election, and subsequent attempts to provide for statutory authority therefore were voided as unconstitutional. *Cf. People ex rel. Scott* v. *Powell,* 42 Ill.2d 132 (1969).

In 1970, a Constitutional Convention was convened (under procedures surprisingly not subject to the equal protection quarantees of the "one person-one vote" principle—*cf. Livingston* v. *Ogilvie,* 43 Ill.2d 9 (1969)) and following extensive sessions commencing on December

8, 1969, ultimately proposed an entirely new Constitution for voter approval on September 3, 1970. Section 12(d) of the Judicial Article, again Article VI, did not differ materially from its predecessor except that it required judges running for retention to achieve an affirmative vote of *60 percent* of electors voting on the question of his retention.

The proposed Constitution, together with four alternative provisions not here pertinent (the abolition of the death penalty, the so-called "merit" system for the selection of judges, the vote for 18-year olds, and the abolition of cumulative voting), were submitted to the electorate and were adopted on December 15, 1970.

Debate on the Judicial Article was extensive in the Convention. A majority and a minority report emanated from the Committee on Judiciary. (Majority Report, pp. 89-91 and Minority Report, pp. 33-35, contained in 1 Illinois Constitutional Convention Committee Proposals, Committee on Judiciary-Article VI.) Debate on the floor was heated, volatile and at times explosive. (3 Convention Proceedings, pp. 2295-2400). The majority proposal, which included the proposition that the retention affirmative vote be raised to 60 per cent, passed by a vote of 69 aye—32 nay. (3 Convention Proceedings, pp. 2357-58). A later motion to amend the proposal by increasing the required affirmative vote to 66-2/3 per cent failed by three votes, 56 aye to 53 nay. (*Id.*, at 2399-2400).

Prior to November 5, 1974, David Lefkovits, a sitting Circuit Court Judge of Cook County, filed a declaration of candidacy to the Cook County Electoral Board. On November 5, 1974, his name was submitted to the electors of Cook County, without party designation, for retention

in office for another term. On November 5, 1974, a total number of 1,438,906 ballots were requested in Cook County. A total number of 587,917 electors voted on the question of Judge Lefkovits' retention with 351,607 voting in the affirmative and 236,310 in the negative. He received an affirmative percentage vote of 59.8 per cent, failing the 60 per cent constitutional requirement by .2 of one per cent.

REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

THE STATE CONSTITUTIONAL REQUIREMENT OF THREE-FIFTHS AFFIRMATIVE VOTE FOR THE RETENTION OF INCUMBENT JUDGES VIOLATES PLAINTIFF'S RIGHTS UNDER THE FOURTEENTH AMENDMENT IN THAT IT CONSTITUTES STATE DENIAL OF EQUAL PROTECTION OF THE LAWS.

A. PRELIMINARY STATEMENT.

As noted by the court below, the issue raised in this action presents a federal question "upon which there is no direct authority." (App. 7a) We submit that this case involves two critical values in our society: 1) the unabridged right of the citizenry of Illinois to equal participation in the elective process, and 2) the independence of the judiciary.

Phrased differently, with the introduction of the concept of the retention elective process for judges, this case presents this Court with a request to protect the integrity of the State judiciary and not subject the tenure of Illinois judges to the whim of special interest groups, such as the media, the bar associations, dissident groups who deem their interests abridged by a judge's decision, and finally the political organization in power in a specific County.

The question complicates itself by the setting of the officials involved. Judges are called upon to make fair, impartial decisions between litigants in every conceivable type of case. When the political structure of his tenure in office is structured so as to give him concern about every special interest group his decision may affect, the possibility or probability of that decision being swayed by expediency instead of impartiality becomes overwhelming, and judicial independence is gone.

Much will be said by the defendants in this case about judicial reform, about judicial impartiality and independence, about building into the system a freedom from partisan politics. As we expect to demonstrate *infra,* the very values which these representatives of our segmented society suggest underlie the present politically structured retention elective system, are themselves undermined by that same system.

Whatever comes of this suit, one factor will remain undisputed. Under the present system, a State court judge now serves many masters when he should serve but one, his own conscience.

B. THE ISSUE IN HISTORICAL PERSPECTIVE.

The birth of the Equal Protection Clause of the Fourteenth Amendment was not an easy delivery. It followed a bitterly contested civil war and an equally bitter contest in the 39th Congress. Cf. Van Alstyne, "The Right to Vote and the 39th Congress," The Supreme Court Review, 33-85 (1965). Its "imprecision was necessary if the right were to be enjoyed in the variety of individual-state relations which the Amendment was designed to embrace." *Burton* v. *Wilmingham Parking Authority,* 365 U.S. 715, 722 (1961).

Of significance, plaintiff submits, is the express statement of the drafters in Section 2 of the Amendment that the force of the Amendment apply to the election of "Judicial officers of a state." The view that Section 2 precluded this Court's consideration of state action in the area of voting, except as such action could be fit into Section 2, has been soundly rejected. See dissent of Justice Harlan in *Reynolds* v. *Sims,* 377 U.S., at 589-632; Van Alstyne, *supra,* The Supreme Court Review 33, 84-85 (1965)

Consequently, plaintiff can perceive no differing constitutional status between state judicial officers and members of the General Assembly. Who among us would state that a retention system like the one at bar would survive constitutional scrutiny if applied to members of the Congress or the House and Senate in the State Legislature.

When the Supreme Court decided to turn from the timid principle of refusing to enter the political thicket [(*Colegrove* v. *Green*, 328 U.S. 549, 556, (1946) and *MacDougall* v. *Green*, 335 U.S. 281, (1948)] and stated in *Baker* v. *Carr*, 369 U.S. 186 (1962), that the plaintiffs stated a cause of action for alleged state gerrymandering, this Court made no limitation to the breadth of its decisions. They extended to *all* elections and *all* candidates in those elections.

In the following year in *Gray* v. *Sanders*, 372 U.S. 368, (1963), the Court struck down a state county-unit system for counting votes and concluded that the Federal Constitution, with its mandate of equal protection, "can mean only one thing—one person, one vote," (Douglas, 372 U.S., at 381) or that "within a given constituency, there can be room for but a single constitutional rule—one voter, one vote." (Stewart, 372 U.S., at 382). See also *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964) (. . . as nearly as practicable one man's vote in a congressional election is to be worth as much as another's.")

In the landmark case of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), Chief Justice Warren made clear the Court's thinking in the following:

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear." (377 U.S. at 554)

The Chief Justice underscored the Court's sentiments with the statement, particularly relevant here:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied *by a debasement or a dilution of the weight of a citizen's vote* just as effectively as wholly prohibiting the free exercise of the franchise." (377 U.S. at 555) [Emphasis supplied.]

See also, *South* v. *Peters*, 339 U.S. 276, 279 (1949), (Douglas, dissenting):

> "The right to vote includes the right to have the vote counted . . . . It also includes *the right to have the vote counted at full value without dilution or discount* . . . . That federally protected right suffers substantial dilution in this case. The favored group has *full voting strength.* The groups not in favor have their votes discounted." [Emphasis added.]

The fact that the instant judicial elections are conducted by local governmental units smaller than a state presents no problem in view of this Court's decisions in *Avery* v. *Midland County*, 390 U.S. 474 (1968) (county) and later in *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970) (school district).

Thus, by 1970 it was clear that weighted election schemes in any governmental division were subject to constitutional scrutiny in light of the Equal Protection Clause. But until that year, this Court concerned itself in the main with systems for the election of can-

didates. It appeared equally clear that in matters and issues divorced from the election of candidates, the "one person-one rule" was applicable. In *Carrington* v. *Rash,* 380 U.S. 89 (1965), the Court ruled that the prohibition of military personnel in a state from voting in state elections, particularly local bond issues, was unconstitutional for "fencing out" the vote of a certain sector of the population. And in *Kramer* v. *Union Free School District No.* 15, 395 U.S. 621 (1969), the Court declared unconstitutional certain restrictive qualifying categories for school district elections because even assuming the State had the power to limit the exercise of the franchise to those "primarily interested" or "primarily affected," the classifications did "not accomplish this purpose with sufficient precision to justify denying (the voter) the franchise." 395 U.S., at 632. See also *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969) (voting rights on bond issues.)

And in *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970), the Court voided a state law permitting only real property owners within a governmental unit to vote in elections concerning the issuance of general obligation bonds, stating:

> "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise."

C. THE SUPER MAJORITY VOTE FOR THE RETENTION ELECTION OF A JUDGE IS CONTRARY TO THIS COURT'S VIEWS IN GORDON v. LANCE.

The question of the requirement of the "extraordinary" or "super" majority vote as it relates to the dilution of

a person's vote was accepted for review by this Court in *Gordon* v. *Lance,* 403 U.S. 1 (1971) In *Gordon,* West Virginia by constitution and statute provided that political subdivisions of the State could not incur bonded indebtedness or increase tax rates beyond those established by the Constitution without the approval of sixty per cent of the voters in a referendum election. The Supreme Court of West Virginia found the sixty per cent constitutional and statutory requirement violative of the Fourteenth Amendment (153 W. Va. 559, 1970 S.E.2d 783 (1969). This Court reversed, distinguishing *Gray* and *Cipriano,* and held that the Equal Protection Clause was not violated by the required extraordinary vote. It concluded that "so long as such (constitutional and statutory) provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause."

Two similar cases decided without opinion in the same term by the Court are *Rimarcihk* v. *Johansen,* 403 U.S. 915 (1971) (requisite 55 per cent vote to ratify home-rule city ordinance); and *Brenner* v. *School District of Kansas City,* 403 U.S. 913 (1971) (66-2/3 per cent vote for school bond issue).

Two significant distinguishing characteristics appear immediately in the *Gordon* opinion. First, we here deal with the election of public officers—judges. The *Gordon* opinion was careful to limit the decision to its facts, *i.e.,* the vote on bond referenda, stating:

> "We intimate no view on the constitutionality of a provision requiring unanimity or giving a veto power to a very small group. Nor do we decided whether a State may, consistently with the Constitution, require extraordinary majorities for the election of public officers." (403 U.S., at 8 n. 6).

Secondly, there was no attempt whatever in the Constitutional Convention to give a rational explanation for the change in the percentage requirement for retention. Moreover, the increase of 10 per cent from the prior Constitution invidiously discriminates against several identifiable classes:

1. It discriminates against hundreds of judges who gave up law practices to ascend the bench under the prior retention vote requirements. These men have substantial property interests in the loss of their law practices and the possible loss of pension rights, some of which have not vested. (A state court judge's pension vests after ten years of service and then increases on a percentage basis until 18 years of service when he can retire on 85 per cent of his current salary.)

2. It discriminates against those judges who refuse to knuckle under or be intimidated by small groups who can exert severe pressure on a judge in his decision-making process.

3. It discriminates against those voters who desire to vote affirmatively to retain a specific judge because their vote is diluted and discounted by those voters desiring to vote negatively on the same issue.

Plaintiff respectfully submits that *Gordon* v. *Lance* and the two decisions in its wake should be limited strictly in scope in view of the Court's apparent turn from the precept of equality in voting and because of the severe criticism the opinion has generated. See Lacy and Martin, "The Extraordinary Majority: The Supreme Court's Retreat from Voting Equity," 10 Calif. West. L. Rev. 551 (1971); Vollmer, "The Extraordinary Majority Rule In Municipal Bonding," 4 Loyola U. of (L.A.) L. Rev.

432 (1971); Hirschfeld, "Extra Majority Election Rules In Retrospect, 1972 Urban Law Annual 207; Jaffe, "The Constitutional of Supermajority Voting Requirements: *Gordon* v. *Lance*, 1971 U. of Ill. L. Forum 703.

D. THERE IS A TOTAL LACK OF ANY RATIONAL BASIS FOR THE 60% AFFIRMATIVE VOTE FOR RETENTION.

Research has not indicated any State Constitution or statute which requires an extraordinary majority for the election or retention of a public officer, nor any case precedent authorizing such a vote. The only analogous system of retention requires only a majority vote. Consequently, it becomes apparent that the delegates to the Constitutional Convention attempted to break new snow with Section 12(d) of Article VI.

An examination of the recapitulations of retention election results in the years 1964, 1966, 1968, 1970, 1972 and 1974 (Exhibits A through F in this Record) reveals a markedly rising experience of a straight "no" vote in communities, which fluctuate between 20 to 30% depending on the judicial circuit, irrespective of the judge's qualifications. The vice of the situation is that any determined, dissatisfied group needs to generate only a 10 to 20% negative vote to defeat any judicial candidate in the State.

With this fact in mind, the following conclusions are irrefutable.

1. Invidious discrimination — "fencing out".

Plaintiff states that defendants can require the appendage of whatever discription they desire to the assault on the right to vote, *e.g.*, invidious discrimination or suspect classification. No matter how the instant facts are sliced, no matter how many words are written in briefs, and no matter how breathless counsel become in argument, the fact will remain that plaintiff's vote has

been diluted by an artificial percentage increase in the vote necessary to retain a judge. His vote for a candidate counts less than another person's vote for the same candidate. We are not dealing here with malapportioned representation, redistricting or any other alleged indirect method to dilute a person's vote as to candidates for a public office. Consequently, plaintiff submits there need be no express showing of discrimination against any "identifiable class" under these circumstances and *Gordon* v. *Lance,* 403 U.S. 1, 8 n.6 (1971) makes that clear.

It must be remembered that we are here dealing with the independence of the judiciary, not some bond issue. The concern of judges about a "determined, dissatisfied group" who can generate a substantial negative vote should be so overriding as to affect his decisions. If he must consider who is involved in the case as opposed to *what* is involved, our system of justice collapses. And this is what this Court in *Gordon* v. *Lance* referred to as "giving a veto power to a very small group." 403 U.S., at 8n.6.

Nor should the judge have an overriding concern as to the attitude of those groups controlling or influencing the sentiment of large segments of our communities. These groups include the regular organizational political parties, the media and also the bar associations. These groups come even closer to the "veto power" indicated in *Gordon* v. *Lance.*

However, if we are to present identifiable classes beyond those designated, plaintiff states that it is ludicrous to suggest that there are no classes "fenced out" in the 60% rule. One needs only to consider comparable population statistics of minorities in Illinois to appreciate

what 10% of the vote means to them. Defendants in the trial court challenged plaintiff to identify the "fenced out" classes within those who vote affirmatively for judges on the retention ballots, and apparently take the position that because no classes are *specifically mentioned* in the constitutional provision, they can manipulate the supermajority percentage upward without fear of constitutional sanction. As we have stated heretofore, if the defendants' premise is accepted, *i.e.,* that this Court has no business even considering this issue, then we submit nothing prevents the supermajority from becoming a super-supermajority to the tune of 65, 75 or even 80 per cent.

If specificity of the possible "fenced out" classes is what the defendants desire consider the following which are but a few of the minority segments who suffer from this rule. (See Affidavit of William J. Harte containing statistics taken from the United States Bureau of Census):

1. The Black minority. There are approximately 1,421,745 black people of a total of approximately 11,109,-450 in the State of Illinois, or approximately 12.8 per cent. In Cook County the percentage is almost 22 per cent.

2. The Brown minority. There are approximately 364,397 people of a total of approximately 11,109,450 in the State of Illinois, or approximately 3.2 per cent. In Cook County, the percentage is 5.2 per cent.

3. The Polish minority. There are approximately 346,148 people of a total of approximately 11,109,450 in the State of Illinois, or approximately 3.1 per cent. In Cook County, the percentage is 5 per cent. Consider

for just a moment the chilling effect of the 60 per cent rule on a candidate emanating from one of the foregoing minorities.

Defendants will no doubt seek support from, and the trial court noted, the restrictive language in *Gordon* v. *Lance*, 403 U.S. 1. We submit that this Court intimated absolutely no view on the constitutionality of the provision under consideration here in view of the differing subject matter. In *Gordon* v. *Lance*, this Court considered a supermajority relative to bonded indebtedness or increased tax rates, a subject matter which would make it very difficult to stir the kind of deepseated prejudices and anxieties an election such as the retention election for judicial candidates can stir. Voting for issues such as bonded indebtedness is simply different from voting form candidates for public office, particularly candidates who are called upon to make judgments every day on hard cases. Inevitably, virtually every judge is faced with hard decisions which will serve as an irritant to special interest groups who can take prohibitive measures against a judge in the next election. Consider for just a moment judges who are called upon to make decisions in such sensitive areas as libel and slander (the media), the constitutional propriety of busing to achieve racial balance in education, the sensational criminal case where the decision brings on a motion to suppress evidence, questions relating to the propriety of the electoral process, etc.

But, again, it is not so much the minorities who are "fenced out" that present the frightening problem in this case. The issue we state again is the independence of the judiciary from groups who would, and probably will, obtain a veto power over the candidacy of one judge.

Some of these groups would include:

1. The regular organization political party within a county which very easily can muster the requisite votes necessary to defeat the candidate for retention, given the necessary 60 per cent affirmative vote. If, as defendants seem to suggest (they also continually decry political involvement of judges), a few political leaders are to determine the retention of judges within any given locale, the tendency of judges to become politicized is increased proportionately and consequently the judge suffers from the inability to resist, given the necessary 60 per cent affirmative vote of the electorate in the forthcoming election.

2. The media. Given a widespread influence over the electorate by those who control the media, it would be relatively simple for a judge to be defeated if his name is circled by those who speak for the media as the incompetent, errant, or simply disagreeable judge.

3. The Bar Associations. The various bar associations now participate actively in screening candidates for judicial office, and specifically determine whether a candidate is or is not qualified in the view of the members of the respective associations. It has always made plaintiff uneasy to contemplate the competency of teachers being passed on by students, particularly under our adversary system where a judge must necessarily determine controversies for one side and against another.

3. Other special-interest groups. There are a variety of ethnic, civil rights, environmental and consumer-oriented groups, too numerous to name, involved in litigation on a day-to-day basis with sufficient strength to defeat or at least endanger the candidacy of a judge given the necessary 60 per cent affirmative vote.

It is interesting to note that none of the defendants' briefs in the trial court below or the court in its decision dwelt on the existent Illinois Courts Commission and the Judicial Inquiry Board. These agencies were created for the express purpose underlying the purported 60 per cent retention system, *i.e.*, (1) to restore confidence in the judiciary; (2) to provide a system for the removal of judges; and (3) to provide judges with a forum for fair hearing which would in turn secure them in their tenure and independence, so necessary for judicial service.

The Judicial Inquiry Board was created by the Constitution of 1970, in Art. VI, sec. 15(b)-(d), which reads as follows:

> "(b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.
>
> (c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepuate, or (2) to charge that the Judge or Associate Judge is physically or

> mentally unable to perform his duties. All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.
>
> (d) The Board shall adopt rules governing its procedures. It shall have subpoena power and authority to appoint and direct its staff. Members of the Board who are not judges shall receive per diem compensation and necessary expenses; members who are Judges shall receive necessary expenses only. The General Assembly by law shall appropriate funds for the operation of the Board."

An explanation of the origin of the Board, together with its duties and aims, is set out in the Constitutional Commentary to Art. VI, sec. 15, in the Smith-Hurd Ann., pp. 532-524. Essentially the purpose of the Board is to "separate the inquisitorial and prosecutorial functions of judicial discipline and retirement from the adjudicatory function." Since its creation, the Board has received complaints from every possible source, initiated complaints, conducted investigations at its own instance or at the instance of others, and participated in the prosecution of judges.

The Illinois Courts Commission also finds authority for its existence in the Constitution of 1970 [Art. VI, sec. 15(e)]:

> "(e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court Judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) to remove from office, suspend without pay, censure or reprimand a Judge or Associate

> Judge for willful misconduct in office, persistent failue to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties."

This Commission conducts and has conducted open hearings, has suspended, disciplined and even removed judges upon complaint of the public, of particular groups, and of the Inquiry Board. There is no appeal from the Commission's decision. See, *e.g., Napolitano* v. *Ward,* 317 F. Supp. 79 (N.D.Ill. 1970).

Consider next the 25 stringent Standards of Judicial Conduct to which the state judges must conform [ch. 110A, sec. 41, Ill. Rev. Stat.], and the other prohibited activities. Secs. 61 to 70. All judges are expressly subject to discipline or removal by the Commission for violation of the Standards and the Rules. Sec. 71.

Given this rather definitive system for the discipline and removal of judges, it is beyond plaintiff's comprehension how the increase of 10 per cent in the retention ballot can be supported on any rational basis. These procedures permit any person, organization, group and even the Inquiry Board to take action against any judge for a variety of reasons and even no reason at all. The judge is tried in a forum where he can defend himself outside the political structure, and outside the arena where the unseen, oppressive veto power of a small dissident group can work its vengeance for a particularly offensive decision (notwithstanding correct one) against it.

Given the existence and functioning of the Judicial Inquiry Board and Illinois Courts Commission, the rational basis for the increase of ten per cent or for that matter the compelling state interest in this area, vanishes.

It cannot possibly be contended that a second, prohibitive instrument, which attacks the very heart of the independence of the judiciary, can underlie the dilution of a person's vote.

If we desire capable men to opt for the bench in Illinois, plaintiff and those 115,000 odd voters, who voted "yes" for David Lefkovits and had their votes voided because of this prohibitive, intolerable constitutional rule respectfully submit that this Court should make short work of this unconstitutional dilution of their votes.

CONCLUSION

For the reasons given, plaintiff respectfully submits that the question presented here is so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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APPENDIX A

Opinion of the District Court, Doc. No. 74 C 3591 Lefkovits v. State Board of Elections, et al.

Before FAIRCHILD, Chief Circuit Judge, and WILL and MARSHALL, District Judges.

MARSHALL, District Judge. In the Illinois general election of November, 1974, Cook County Circuit Court Judge David Lefkovits was a qualified candidate for judicial retention. *Ill. Const. Art.* VI, §12(d). John T. Meagher was then and is now a qualified elector residing in Cook County, Illinois who cast his ballot in favor of Judge Lefkovits' retention. The final canvass of the votes revealed that only 59.8% of the electors casting ballots on the question of the Judge's retention voted in the affirmative. Having failed to receive the affirmative vote of three-fifths of the electors, the Illinois Constitution required that Judge Lefkovits' position as a circuit court judge be declared vacant. *Ill. Const.* Art. IV, §12(b).

To avoid this result, Judge Lefkovits and Mr. Meagher filed an action in the Circuit Court of Cook County seeking declaratory and injunctive relief that the three-fifths majority requirement for retention violates both the Illinois and United States Constitutions. They sought and obtained from the state court a preliminary injunction restraining the defendants, who are various state and county officials responsible for determining election results, from interfering with the right of Judge Lefkovits to serve as a circuit court judge, from declaring that he had not been retained and from declaring his office vacant.

Thereafter, the defendants removed the action of this court, 28 U.S.C. §1441 (1970), and requested that a three-judge court be convened. 28 U.S.C. §2281 (1970). Defendants correctly maintain that subject matter jurisdiction

is here under 28 U.S.C. §1331 as well as under 42 U.S.C. §1983 and 28 U.S.C. §1343(3). Because the plaintiffs sought a permanent injunction restraining the defendant state and local officials from enforcing the retention provision of the Illinois Constitution on the theory that the provision violated the United States Constitution, a three-judge court was impaneled. 28 U.S.C. §2281 (1970); *Wojcik* v. *Levitt*, 513 F.2d 725 (7th Cir. 1975).

Shortly after removal here, Judge Lefkovits voluntarily relinquished his judgeship, retired and withdrew from the action.[1] At the same time, the Illinois State Bar Association, the Chicago Council of Lawyers, and the Chicago Bar Association were granted leave to intervene. *Fed R. Civ. P.* 24. The state and intervening defendants have now moved to dismiss the action for failure to state a claim upon which relief can be granted or in the alternative for summary judgment. *Fed. R. Civ. P.* 12(b) (6) and 56.

The Illinois court system is akin to the federal system. The courts of original jurisdiction are the circuit courts, followed by five intermediate appellate courts, and the Illinois Supreme Court. When selected initially to serve a full term, all of the judges of those courts (except associate judges of the circuit courts) are nominated at primary elections or by petition, elected at general elections, *Ill. Const.* Art. VI, §12(a), by a plurality of the votes cast on the question, *Ill. Rev. Stat.*, ch. 46, §22-7 (1973), and serve a term of six years. *Ill. Const.* Art. VI, §10. Associate judges of the circuit courts are appointed by the circuit judges as provided by the rules of the Illinois Supreme Court. *Ill. Const.* Art. VI, §8; Ill. Sup. Ct. Rule 39, *Ill. Rev. Stat.*, ch. 110A, §39 (1973).

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[1] We take judicial notice of the appointment of Jose Vasquez to the office of circuit court judge on January 11, 1975, effective February 1, 1975, by the Illinois Supreme Court to fill the vacancy left by Judge Lefkovits. *Fed. R. Evid.* 201(b) and (f) (effective July 1, 1975).

Once elected, a judge may, at the expiration of his term, run for retention rather than for reelection. The retention provision of the Illinois Constitution provides:

> Not less than six months before the general election preceding the expiration of his term of office, a Supreme Appellant or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself. The Secretary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question where each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his election.[2]

If he fails to receive the 60 percent, as was the case with Judge Lefkovits, a vacancy in the office is declared and a new judge is appointed by the Illinois Supreme Court to serve until the next general election, at which time he may run for election, but not retention.

If a judge is eligible to seek retention, he apparently need not do so. He could run for reelection, which re-

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[2] The provisions of this section, which is the center of the present controversy, allow previously elected judges to serve an additional term in office without running in a contested election. The judge seeks retention solely on the basis of his record and does not run against any other individual or party. Unlike an election, however, the judge seeking retention must receive the affirmative vote of 60% of the electors voting on his retention to enable him to serve another term.

quires only a plurality of the vote, but he would also have to gain renomination through a primary or petition. As a consequence, no judge eligible for retention has sought reelection.

Judge Lefkovits was elected to the position of circuit court judge in 1968, and his term of office expired in 1974. He sought retention. And, as previously noted, he failed to receive the percentage of votes necessary to retain his office.[3]

The amended complaint is in two counts. Count I asserts various grounds for relief in behalf of Judge Lefkovits and Meagher. Since the Judge has withdrawn from the case, there is no need to consider his contentions. Meagher, however, asserts that if Judge Lefkovits is not allowed to retain his seat because of the 60% affirmative vote requirement, he and the class he assertedly represents[4] will be deprived of rights guaranteed them under both the United States and Illinois Constitutions. Specifically, the supermajority requirement (1) violates the equal protection clause of the Fourteenth Amendment;[5] (2) "violates the Fourteenth Amendment to the United States Constitution in that the three-fifths affirmative [sic] fails to guarantee every citizen a republican form of government and thwarts the majority will of the people in the election of judges for retention;"[6] (3) and violates the equal protection clause of the Illinois Constitution, Art. I, §2, in that it deprives him of his

[3] The failure to be retained does not bar a judge from running for the same office in a subsequent election, although the practicality of so doing is questionable. Comments of Delegates Fay and Lewis, III Proceeding of the Illinois Constitutional Convention 2395, 2399 (1972).

[4] Because of the disposition of the case, there is no need to decide whether the suit should be allowed to proceed as a class action.

[5] Complaint, ¶12(c).

[6] *Id.* ¶13(d).

right to have his vote counted equally and without dilution along with the other votes of residents of Cook County.

The second count of the amended complaint realleges all of Count I and states additionally that Meagher will vote in the next general election for the retention of judges in the Circuit Court of Cook County, who will be subject to the 60% requirement of Section 12(d), and, as a result thereof, he will suffer the same constitutional deprivations alleged in Count I.

The Illinois State Bar Association urges in its memorandum in support of the motion to dismiss that Meagher lacks standing under Count I to press the claims of Judge Lefkovits and that as to Meagher and the class he represents, the case is moot because Judge Lefkovits has since retired and taken judicial pension.[7] We agree that Meagher does not have standing to assert claims on behalf of Judge Lefkovits. *See Sierra Club* v. *Morton*, 405 U.S. 721 (1972); *United States* v. *S.C.R.A.P.*, 412 U.S. 669 (1973). But, while the argument relating to mootness is persuasive, *cf. DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) (per curiam); *Golden* v. *Zwicker*, 394 U.S. 103 (1969), there is no need to decide the issue since the disposition of Count II, which clearly presents a live case or controversy that Meagher has standing to pursue, would similarly dispose of the claims asserted under Count I.[8]

[7] "The rule in federal cases is that an action controversy must be present at all stages of review, not merely at the time when the complaint is filed. *See, e.g., Doe* v. *Wade*, 410 U.S. at 125; *SEC* v. *Medical Com'n for Human Rights*, 404 U.S. 403 (1972). *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)." *Stiffel* v. *Thompson*, 415 U.S. 452, 458 n.10 (1974).

[8] That plaintiff Meagher has standing is settled by *Baker* v. *Carr*, 369 U.S. 186, 204-208 (1962), and its progeny.

The complaint raises three asserted denials of constitutional rights. One is that the equal protection clause of the Illinois Constitution, Art. I, §2, is violated by the retention article of the same constitution. This contention is without merit and the plaintiff has not offered any argument in its support. Clearly, if a state constitution mandates a particular manner of electing officials, *ipso facto* the provision is constitutional under the state constitution, notwithstanding the existence of a general state constitutional provision that could be read to prohibit the same procedure if enacted as a statute.[9]

In addition to his state claim, the plaintiff asserts two contentions under the Federal Constitution. The first of these is that the three-fifths requirement violates the guaranty clause of the United States Constitution.[10] This argument is foreclosed by the Supreme Court's landmark decision in *Luther* v. *Borden,* 48 U.S. (7 How.) 1, 42 1849), in which the Court held that claims that a state failed to provide a republican form of government were non-justiciable and therefore not cognizable by the federal courts. *See Baker* v. *Carr,* 369 U.S. 186, 218-224 (1962).

The remaining contention is that the three-fifths requirement denies the plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment, in that his affirmative vote for retention of judges is diluted and debased by the extraordinary majority requirement.[11]

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[9] The provision of the state Constitution could, however, violate the federal Constitution, and if such is the case the sovereignty of the people to adopt their own constitution must give way to the limitations imposed by the United States Constitution. *See Hunter* v. *Erickson,* 393 U.S. 385, 392 (1969).

[10] "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." *U.S. Const.* Art. IV, §4.

[11] Although the argument is pleaded rather obscurely, this is the position that emerges upon a reading of the plaintiff's briefs.

This argument presents a federal question which is not "wholly insubstantial" (*Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962)) and upon which there is no direct authority. Fortunately, however, the Supreme Court has considered an extraordinary majority requirement in another context and that decision is a logical starting point of analysis.

In *Gordon* v. *Lance,* 403 U.S. 1 (1971), the Court reviewed the constitutionality of a 60% vote requirement to raise the public debt. The Constitution and statutes of West Virginia provided that political subdivisions of the state could not incur bonded indebtedness or increase taxes beyond certain constitutional limitations without the affirmative approval of 60% of the voters in a referendum election. In 1968, a local board of education proposed the issuance of general obligation bonds and a levy of additional taxes to finance certain expenditures and capital improvements. Both proposals received a majority vote, but failed to obtain the required 60% approval. Thereupon, a number of individuals who had voted in favor of the proposals brought an action in the state court to declare the extraordinary majority requirement unconstitutional as violative of the equal protection clause of the Fourteenth Amendment. Relying heavily on *Gray* v. *Sanders,* 372 U.S. 368 (1963), and *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969), the Supreme Court of West Virginia agreed with plaintiffs. *Lance* v. *Board of Education,* 153 W.Va. 559, 170 S.E. 2d 783 (1969), *noted* in 83 *Harv. L.R.* 1911 (1970).

Reversing the decision of the West Virginia court, the Supreme Court first distinguished *Gray* and *Cipriano.*

> We conclude that the West Virginia court's reliance on the *Gray* and *Cipriano* cases was misplaced. The defect this Court found in those cases lay in the denial or dilution of voting power because of group characteristics— geographic location and property ownership—that bore no valid relationship to the interest of those groups in the subject matter of

> the election; moreover, the dilution or denial was imposed irrespective of how members of those groups actually voted.[12]

In the process of distinguishing those two cases, the Court delineated the three broad areas in which it had concluded that state electoral laws violated the equal protection clause. The first set of cases, such as *Gray*, involved geographic factors or state districting and apportionment which had weighted or diluted the votes of some citizens as against others. Collectively these cases are usually referred to as the one-person-one-vote decisions. *See, e.g., Gaffney* v. *Cummings*, 412 U.S. 735 (1973); *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

The second area concerned cases in which states had excluded certain classes of citizenry from the ballot. For example, in *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), the Court held that a state could not, consistent with the equal protection clause, limit the franchise in school board elections to those individuals who owned or leased taxable real property in the district, or who were parents or guardians of a child of school age, since the statute was both over and under inclusive in classifying those who were primarily interested in school board elections. 395 U.S. at 632. *See also, Dunn* v. *Blumstein*, 405 U.S. 330 (1972) (duration of residency requirements); *Carrington* v. *Rash*, 380 U.S. 89 (1965) (military status).

A third class of voting cases which has run afoul of the equal protection clause is typified by *Hunter* v. *Erickson*, 393 U.S. 385 (1969). There, the City of Akron, Ohio, enacted an ordinance that made the passage of open housing ordinances more difficult than other city ordinances. The Court concluded that the ordinance violated the equal protection clause because it singled out a distinct class—"those who would benefit from laws barring racial, religious, or ancestral discrimination," (393 U.S. at 391) and imposed upon its members special burdens within the governmental process. The Court concluded:

> [T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute a person's vote or give any group a smaller representation than any other group of comparable size. *Cf.* Reynolds v. Sims, 377 U.S. 533 (1964); Avery v. Midland County, 390 U.S. 474 (1968).[13]

Applying the principles announced in these three classes of cases, the Court held in *Gordon* that the 60 percent voting requirement did not violate the equal protection clause. The state did not impose any element of geographic discrimination in its voting requirement. Nor did it fence out any particular group of people because of the way they vote or impose an extraneous condition on the right to exercise the franchise. All that West Virginia did was to make some forms of governmental action more difficult.

> Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a Governor by a state legislature, after no candidate received a majority of the popular vote. *Fortson* v. *Morris*, 385 U.S. 231 (1966).
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> The Federal Constitution itself provises that a simple majority vote is insufficient on some issues; the provisions on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes entire areas of legislation from the

[12] 403 U.S. at 4 (footnote omitted).

[13] 393 U.S. at 393. *See Reitman* v. *Mulkey*, 387 U.S. 369 (1967). *But see James* v. *Valtierra*, 402 U.S. 137 (1971).

concept of majoritarian supremacy. The constitutions of many States prohibit or severely limit the power of the legislature to levy new taxes or to create or increase bonded indebtedness, thereby insulating entire areas from majority control. Whether these matters of finance and taxation are to be considered as less "important" than matters of treaties, foreign policy, or impeachment of public officers is more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment. . . .

• • •

We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause. We see no meaningful distinction.[14]

The decision and logic of *Gordon* are, despite the Court's disclaimer in footnote six that it was expressing no opinion on the issue of whether the states could constitutionally require extraordinary majorities in the election of public officials, persuasive on the question *sub judice* for the Illinois retention system is in essence a referendum on whether a particular judge shall be retained in office. Nevertheless, the Court's disclaimer requires a further examination of the Illinois judicial retention article and the equal protection clause arguments asserted against it.

The first step in deciding whether Section 12(d) of Article VI of the Illinois Constitution violates the equal protection clause is to determine if an identifiable class exists against which the section can be said to authorize discimination. Clearly, if the section does not authorize discrimination against an identifiable class there can be no violation of the equal protection clause. *Gordon* v. *Lance*, 403 U.S. at 5.

[14] 403 U.S. at 6-7 (footnotes omitted).

The Illinois constitutional provision does not arbitrarily deny the franchise to any particular group. All otherwise qualified voters are entitled to vote on the question of whether a judge should be retained. Thus there can be no contention that the section violates the equal protection clause in the manner found offensive in cases such as *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), or *Carrington* v. *Rash*, 380 U.S. 89 (1965).

Granted that there is no particular class of voters disenfranchised by an outright denial of the ballot, the plaintiff still maintains that the retention provision cannot be sustained when examined against the one-person-one-vote decisions. Simply stated, the plaintiff asserts that weighting the votes of those who oppose retention more heavily than those who favor retention results in an unconstitutional dilution of the votes of the class of voters who favor retention.

The defendants have all strenuously asserted that the one-person-one-vote cases are inapplicable to the judiciary and therefore offer no support for the plaintiff's position. In support of this argument, they rely on a number of district court decisions holding that the judiciary need not be apportioned on a strict population basis. For example, in *Holshouser* v. *Scott*, 335 F.Supp. 928 (N.D.N.C. 1971) (3-judge court), *aff'd*, 409 U.S. 807 (1972), the plaintiffs alleged that the North Carolina system of nominating judges by district and then subjecting them to statewide election violated the principle of one-person-one-vote. The district court first held that judges, unlike legislators or other officials who represent people,[15] need not be apportioned on the basis of population because they do not govern or represent a particular constituency. "They must decide cases exclusively on the basis of law and justice and not upon the popular view prevailing at the time." 335 F.Supp. at 932. The court then went on to hold that a state method of selecting judges could be struck down only

[15] *See Hadley* v. *Junior College District*, 397 U.S. 50 (1970).

if there was a showing of an arbitrary or invidious distinction between citizens and voters, a conclusion which did not follow from the North Carolina Constitution and satutes since in both the primary and general election each vote counted the same.[16]

Holshouser and the cases regerred to above are not, however, dispositive of the plaintiff's equal protection claim that a majority must prevail on the retention ballot. Those cases merely hold that judges need not be apportioned on a population basis because the functions they perform are not of the same nature as those elected officials to which the equality of population principle has been applied. But when a judge is to be elected or retained, regardless of the scheme of apportionment, the equal protection clause requires that every qualified elector be given an equal opportunity to vote and have his vote counted. This is the essence of the one-person-one-vote principle.

To decide that the Illinois judicial retention article must be compatible with the one-person-one-vote require-

[16] A number of other district courts have considered challenges to the apportionment of state judiciaries. In each instance the court has concluded that the one-person-one-vote principle did not require that the judiciary be apportioned on a population basis. *Wells* v. *Edwards,* 347 F.Supp. 453 (N.D.La. 1972) (3-judge court), *aff'd,* 409 U.S. 1095 (1973) (Justices of the Louisiana Supreme Court); *New York State Ass'n of Trial Lawyers* v. *Rockefeller,* 267 F.Supp. (S.D.N.Y. 1967) (lower court judges need not be apportioned on a per capita basis); *Buchanan* v. *Rhodes,* 249 F.Supp. 860 (N.D.Ohio, 1962) (judges need not be apportioned on the basis of population); *Stokes* v. *Fortson,* 234 F.Supp. 575 (N.D.Ga. 1964) (3-judge court) (State constitutional provision requiring judges and solicitor generals to be nominated by district and elected statewide did not violate the equal protection clause). None of these cases, however, dealt with a requirement that a judge be elected or retained by an extraordinary majority.

ment only begins the inquiry. The next step is to determine the scope of the principle and its applicability to the particular facts at hand.

In *Gray* v. *Sanders,* 372 U.S. 368 (1963), the Court struck down the county unit voting system employed in Georgia to nominate United States Senators and statewide officers. The effect of the system was to give counties with small populations an inordinate amount of voting power as compared with counties with a large population. The Court concluded that this geographical weighting of votes between rural and urban voters was impermissible.

> Once the geographical unit for which the representative is to be chosen is designated, all who participate in the election are to have an equal vote. . . . The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.[17]

In *Reynolds* v. *Sims,* 377 U.S. 533 (1964), the Court considered whether the apportionment of the Alabama legislature conformed to the guarantees of the equal protection clause. Both houses of the legislature were apportioned in such a manner that sparsely populated rural districts were given equal representation with far more populous urban ones. The Court concluded that the legislative districting could not stand. As nearly as practical the districts had to be constructed of equal numbers of people.

> The right to vote freely for the candiate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[18]

[17] 372 U.S. at 379, 381 (footnotes omitted).

[18] 377 U.S. at 555. *See Wesberry* v. *Sanders,* 376 U.S. 1 (1964).

The one-person-one-vote equality of representation principle of *Reynolds* was subsequently extended in a number of other cases requiring numerically equal population apportionment in the case of Congressmen, state legislators, county commissioners, and school boards. *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), *Lucas* v. *Forty-Fourth General Assembly*, 377 U.S. 713 (1964); *Avery* v. *Midland County*, 390 U.S. 474 (1968); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970).

From these cases the plaintiff argues that, by requiring a 60% affirmative vote for the retention of judges, Illinois has diluted and debased the vote of the class of voters who favor the retention of a particular judge, and that the state cannot, consistent with the equal protection clause, require that a judge obtain more than a majority vote to be retained.

There are several flaws in the plaintiff's argument. The first is the assumption that the one-per-one-vote paradigm implies that a super majority requirement unconstitutionally dilutes or discounts a person's vote. *Gray* and *Reynolds*, however, concerned instances in which the state electoral process weighted or diluted a citizen's vote on the basis of where he lived. The Illinois judicial retention process does not suffer from this infirmity. Each voter is entitled to cast one vote and that vote is counted at the same value as any other voter's. There is no geographic discounting. What the plaintiff complains of is that his vote does not have the same marginal impact on the outcome of the election as a voter of a different persuasion. Or, stated another way, he does not have an equal opportunity to have his policy preference prevail at the polls. *See* 83 *Harv. L. Rev.* 1911, 1915, 1916 (1970). This latter argument is merely an assertion that the majority will must prevail in a judicial retention election.

The Supreme Court, despite some language in the reapportionment cases to the contrary,[19] has never embraced a strict majoritarian philosophy. Rather, it is more appropriately characterized as a philosophy of egalitarianism. Linde, "Judges, Critics, and the Realist Tradition," 82 *Yale L.J.* 227, 230 (1972).[20] For example, in *Fortson* v. *Morris*, 385 U.S. 231 (1966), the Court upheld the right of the Georgia state legislature to select a governor from the two candidates with the largest vote if no candidate received a majority in the election, although the process could and did result in the election of a governor who did not receive the highest number of votes at the general election. The rejection of a majoritarian rule of decision becomes all the more obvious with *Gordon* v. *Lance*, *supra*, *Abate* v. *Mundt*, 403 U.S. 182 (1971), and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), the latter two decisions rejecting equal protection claims against multimeter legislative districts and an apportionment scheme with an 11.9% population variation. As Mr. Justice Harlan stated in his concurring opinion in *Whitcomb*, "If the philosophy of majoritarianism had been given its head, it would have led to different results in each of the cases decided today [*Gordon*, *Abate*, and *Whitcomb*], for it is in the very nature of the principle that it regards majority rule as an imperative of social organization, not subject to compromise in the furtherance of merely political ends."[21]

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[19] *See, e.g., Reynolds* v. *Sims*, 377 U.S. 533, 565-66 (1964); *Fortson* v. *Morris*, 385 U.S. 231, 251 (1966 (Fortes, J., dissenting).

[20] *But see*, A. Bickel, *The Supreme Court and the Idea of Progress*, 108-15 (1970).

[21] 403 U.S. at 167.

The preceding discussion necessitates the conclusion that a denial of majoritarianism does not deny political equality to those who favor the retention of judges. Thus plaintiff must go further and show that the retention provision is designed to dilute the voting or representational strength of a particular identifiable political element. *See White* v. *Secretary of State of Texas*, 412 U.S. 755 (1973); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *LoFrisco* v. *Schaffer*, 341 F.Supp. 743 (D.Conn.) (3-judge court), *aff'd*, 409 U.S. 972 (1972); *Kaelin* v. *Warden*, 334 F.Supp. 602 (E.D.Penn. 1971).

The plaintiff's pleadings and briefs do not show that the Illinois retention provision was designed to or has the effect of denying or diluting the voting or representational strength of a particular identifiable group.[22] The most that can be said is that in some future retention election a now inchoate group of voters may organize themselves in sufficient numbers to defeat the retention of a particular judge with whom they are dissatisfied by a total vote of less than 50 percent.

We earlier observed that *Gordon* v. *Lance*, *supra*, was persuasive authority in support of the validity of the Illinois judicial retention process. Because of the Supreme Court's disclaimer that *Gordon* did not decide whether states could require extraordinary majorities in the elec-

[22] The plaintiff makes the bold assertion that various minorities in Chicago (blacks, browns and the Polish) suffer a chilling effect because of the 60% requirement. No explanation is given as to how the supposed chilling effect works or whether it has operated to deny a judge's retention. The most plaintiff has done is establish the existence of numerous minority groups in Cook County. That is a far cry from establishing that the retention provision discriminates against any of these groups.

tion of public officials, an examination of the Illinois retention provision has been undertaken. We conclude that the provision in essence calls for a referendum, not an election, on the proposition of whether a particular judge shall be retained in office. In such circumstances, an extraordinary majority requirement is constitutionally permissible so long as it does not discriminate against an identifiable class of voters.

It should be noted, however, that the question of whether a judge or any public official can be required to be elected by more than majority vote has not been decided. All we have concluded is that the retention of judges may, consistent with the equal protection clause, be subject to an affirmative vote of 60% of the electors casting ballots on the question. Under the Illinois system, the minority can never elect a judge. Its power is solely limited to blocking retention. Once a judge is not retained, the Illinois Supreme Court fills the vacancy created and the appointee serves until the next election at which time he must run for election.

There can be no dispute that Illinois has broad and sweeping powers over the organization of its courts. It may define the jurisdiction of its "several courts, either as to subject matter, amount, or finality of their respective judgments." *New York State Ass'n of Trial Lawyers* v. *Rockefeller*, 267 F.Supp. 148, 151 (S.D.N.Y. 1967). *See Mallet* v. *North Carolina*, 181 U.S. 589, 597-99 (1901). And it has the power to prescribe the manner in which it selects judges. *Sugarmann* v. *Dougall*, 413 U.S. 634, 647 (1974); *Boyd* v. *Thayer*, 143 U.S. 135, 161 (1892).

Illinois has decided that its judges shall be elected in the first instance, and thereafter a judge may run on his record for retention without opposition from any other candidate. The Illinois judicial article, *Ill. Const.* Art. VI, was the subject of extensive debate at the Illinois Constitutional Convention in 1969 and 1970. Some delegates favored an appointment plan for the selection of

judges, while others favored an elective system. Those who favored election prevailed. But even in this there was a great deal of dispute, one area of which was the retention system. Some delegates favored only a 50% requirement, VI *Record of Proceedings of the Sixth Illinois Constitutional Convention*, 1100-1101 (1972) (Judiciary Minority Proposal 3A at 34-35), others preferred a requirement as high as 66-2/3%. III *Proceedings*, 2393-2400 (1972). The Convention compromised on a figure of 60%,[23] which represented an accommodation among a number of competing interests. On one hand, the majority recognized that a form of tenure was necessary to guarantee the independence of the judiciary, while on the other hand, it was felt that there had to be a method of allowing the electorate to remove those judges in whom, for one reason or another, they no longer had confidence. The majority felt that a requirement of less than 60% would make it almost impossible to remove judges who had lost public confidence. VI *Proceedings*, 1030-31 (1972) (Judiciary Committee Proposal 3, at 89-90).

Whether the Illinois retention provision is a wise manner of securing the tenure and independence of the Illinois judiciary is, of course, not the issue presented.[24] Wisely or not, the people of Illinois have resolved that a simple majority is insufficient to retain a judge for another term of office. *Cf. Gordon* v. *Lance*, 403 U.S. 1, 7 (1971). Since the 60% requirement does not discriminate against or authorize discrimination against any identifiable class there is no violation of the equal protection clause.

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[23] *See, e.g.*, III *Proceedings*, 2294-2296, 2398, 2303, 2318-19, 2329-30, 2339, 2393-2400.

[24] For a discussion of the retention system and the voting requirements, see Cohn, "The Illinois Judicial Department Changes Effected by the Constitution of 1970," 1971 *Ill. L. Forum*, 355, 401; "The Need for Reexamination of the Illinois Constitution," 50 *Chi. Bar Rec.*, 18, 19-20 (1968).

Defendants' alternative motion to dismiss or for summary judgment should be granted. Judgment will enter dismissing plaintiff's action.

ENTER:

/s/ Thomas E. Fairchild
Thomas E. Fairchild
Chief Circuit Judge

/s/ Hubert L. Will
Hubert L. Will
District Judge

/s/ Prentice H. Marshall
Prentice H. Marshall
District Judge

Dated: September 3, 1975.

APPENDIX B

Re: Lefkovits v. State Board of Elections, et al.,
Doc. No. 74 C 3591, filed September 25, 1975

NOTICE OF APPEAL

Please Take Notice that the plaintiff, John T. Meagher, in this cause, pursuant to Chapter 28, Section 2102(b), U.S.C. appeals to the Supreme Court of the United States from the Judgment of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the plaintiff's cause of action, entered on September 3, 1975.

By this appeal, the plaintiff will ask the Supreme Court to vacate and set aside the Judgment entered in favor of the defendants and against the plaintiff, and to enter Judgment for the plaintiff, or in the alternative, to reverse the Judgment and remand this cause for a new trial or such other relief as the plaintiff may be entitled to on this appeal.

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